IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

PHOENIX LICENSING, L.L.C. AND LPL LICENSING, L.L.C. v.	No. 2:11-cv-286-MHC
ALLIANCE DATA SYSTEMS CORPORATION, ET AL	JURY TRIAL DEMANDED

JOINT CONFERENCE REPORT

Plaintiffs, Phoenix Licensing, LLC and LPL Licensing LLC, and Defendants Alliance,[1] CNO,[2] Credit One,[3] CUNA,[4] Farmers,[5] First National,[6] GE,[7] First Premier,[8] First Tennessee Bank NA ("First Tennessee"), Humana,[9] M&T,[10] Regions,[11] and TCF,[12] respectfully submit this Joint Conference Report as follows:

[1] Alliance Data Systems Corporation, ADS Alliance Data Systems, Inc., World Financial Capital Bank, World Financial Capital Credit Company, LLC, WFN Credit Company, LLC, and World Financial Network Bank successor by conversion to World Financial Network National are collectively referred to as "Alliance."
[2] CNO Financial Group Inc. and Colonial Penn Life Insurance Company are collectively referred to as "CNO."
[3] Credit One Bank N A, Credit One Financial, and Sherman Financial Group LLC are collectively referred to as "Credit One."
[4] CUNA Mutual Insurance Society, CUNA Mutual Insurance Agency Inc. and Cuna Mutual Life Insurance Company are collectively referred to as "CUNA."
[5] Defendants Farmers Group Inc., Farmers Insurance Company Inc., Farmers New World Life Insurance Company, 21st Century Insurance and Financial Service Inc., 21st Century Insurance Company, 21st Century Insurance Company of the Southwest, 21st Century National Insurance Co. and 21st Century North America Insurance Co. are collectively referred to as "Farmers."
[6] First National Bank of Omaha, First National Credit Card Center Inc., and First National of Nebraska Inc. are collectively referred to as "First National."
[7] GE Capital Financial Inc., GE Consumer Finance Inc., GE Money Bank FSB, General Electric Capital Corporation, General Electric Capital Services Inc., and General Electric Company are collectively referred to as "GE."
[8] First Premier Bank, Premier Bankcard LLC and United National Corporation are collectively referred to as "First Premier."
[9] Humana Inc., Humana Health Plan Inc., Humana Insurance Company, and Humana Dental Insurance Company are collectively referred to as "Humana."
[10] M&T Bank, M&T Bank Corporation, M&T Bank NA, M&T Corporation, M&T Securities Inc., Manufacturers and Traders Trust Company, and Wilmington Trust Corporation are collectively referred to as "M&T."
[11] Regions Bank NA, Regions Investment Corporation, Regions Investment Services Inc., and Regions Financial Corporation are collectively referred to as "Regions."
[12] TCF National Bank, TCF Agency Inc., TCF Agency Insurance Services, Inc. and TCF Financial Corporation are collectively referred to as "TCF."

(1) A factual and legal description of the case which also sets forth the elements of each cause of action and each defense.

Plaintiff's Contentions:

Plaintiff Phoenix Licensing, LLC owns inventions comprising the following marketing technology (i.e., the "patented marketing technology"):

(a) Computerized apparatuses, methods, or systems that implement decision criteria, product information, and client information to automatically select and present products appropriate for the client via client communications (for example, a direct mail communication incorporating variable information) as described and claimed in United States Patent Number 5,987,434 entitled "Apparatus and Method for Transacting Marketing and Sales of Financial Products" (the "'434 patent");

(b) Apparatuses, methods, or systems that automatically prepare customized replies to responses, generated from marketing communications delivered to clients for products or services, such as financial products or services, as described and claimed in United States Patent Number 6,999,938 entitled "Automated Reply Generation Direct Marketing System" (the "'938 patent"); and

(c) Apparatuses, methods, or systems that automatically generate personalized communication documents for financial products or services, where the communications include personalized content that present alternative descriptions, characteristics and/or identifications associated with the financial product or service, as described and claimed in United States Patent Number 7,890,366 entitled "Personalized Communication Documents, System and Method for Preparing Same" (the "'366 patent") (The '434, '938, and '366, patents are collectively referred to as the "patents-in-suit.")

Pursuant to an exclusive license agreement, Plaintiff LPL Licensing LLC (hereinafter, Plaintiffs are referred to collectively as "Plaintiffs" or "LPL), is the exclusive licensee of the Patents. Plaintiffs contend that Defendants' marketing technology infringes the patents-in-suit.

Plaintiffs will provide infringement contentions to Defendants pursuant to the Court's schedule and accordance with Patent Rule 3-1.

Plaintiffs contend that determining direct patent infringement requires determining whether someone (1) without authority (2) makes, uses, offers to sell, sells, or imports (3) the patented invention (4) within the United States, its territories, or its possessions (5) during the term of the patent. Infringement exists if any one of the patent's claims covers the alleged infringer's product or process. For infringement to exist, all of the claim's elements must be found, either literally or equivalently, in the accused product or process.

Plaintiffs contend that determining induced infringement requires determining, in general, whether someone has actively aided and abetted another's direct infringement with knowledge (which may be satisfied by willful blindness) that the induced acts constitute patent infringement.

Plaintiffs contend that determining contributory infringement requires determining, in general, whether someone has supplied of a component of a patented machine, manufacture, or material that can be used in a patented process; with knowledge that it may be used to infringe a patent; and that the component is not simply a staple product with substantial non-infringing uses.

Plaintiffs contend that Defendants have been willfully infringing the patents-in-suit patent since each received notice of same. To prove willful infringement, a patent owner must prove by clear and convincing evidence that the infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent, and that this objectively-defined risk was either known or should have been known to the accused infringer.

Plaintiffs contend they have been damaged as a result of Defendants' infringing conduct. Defendants are, therefore, liable to Plaintiffs in an amount that adequately compensates Plaintiffs for Defendants' infringement, which, by law, cannot be less than a reasonable royalty. A reasonable royalty determination may be based on a hypothetical royalty based on a supposed arm's length negotiation taking place at the time the infringement began between a willing

licensor and a willing licensee who had knowledge that the patent would be sustained as valid and infringed, if litigated.

Plaintiffs contend that Defendants will continue their infringement of the patents-in-suit unless enjoined by the Court. Defendants' infringing conduct causes Plaintiff irreparable harm and will continue to cause such harm without the issuance of such an injunction.

Defendants' Contentions:

Defendants deny infringing the patents-in-suit and further contend that the patents-in-suit are invalid. Defendants contend that they do not directly, indirectly, or willfully infringe any asserted patent claim. Further, Defendants have each asserted various other defenses including non-infringement, invalidity, equitable defenses, time limitation on requested damages, intervening rights, and no injunctive relief. Given the actual case and controversy between Plaintiffs and Defendants, certain defendants have also asserted counterclaims claims for declaratory judgment of non-infringement and invalidity of the patents-in-suit. Certain defendants have also filed motions to dismiss under Fed. R. Civ. P. 12(b)(6) and Fed. R. Civ. P. 12(b)(2). Additionally, the TCF Defendants contend that they are not amenable to personal jurisdiction in this venue, and have filed a motion to dismiss for lack of personal jurisdiction under Fed. R. Civ. P 12(b)(2).

Defendants contend that while the Plaintiffs have stated certain elements for causes of action for various claims, these are not required under Fed. R. Civ. P. 26(f). By not responding to each of the Plaintiffs contentions, Defendants do not admit that Plaintiffs have stated the elements of each cause of action correctly.

Defendants also note that discovery is ongoing, and reserve the right to make allegations regarding inequitable conduct, or any other defense, if information arises that would support such claims or defenses.

(2) The date the Rule 26(f) conference was held, the names of those persons who were in attendance, and the parties they represent.

The initial Rule 26(f) conference was held on March 19, 2012, and there were multiple follow-up communications thereafter. Persons in attendance for the initial Rule 26(f) conference, and the parties they represent, are as follows:

Plaintiff – LPL	Charles van Cleef of Cooper & Van Cleef, PLLC John Edmonds, Andrew Tower and Johnathan Yazdani of Collins, Edmonds & Pogorzelski, PLLC
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(3) A list of any cases that are related to this case and that are pending in any state or federal court with the respective case number and court.

Pending cases related to this are the following: *Phoenix Licensing, L.L.C. et al v. ING Bank FSB et al.*; No. 2:10-cv-064-JRG (USDC EDTX); *Phoenix Licensing, L.L.C. et al v. Aegon USA, Inc. et al.*; No. 2:10-cv-212-JRG (USDC EDTX); *Phoenix Licensing, L.L.C. et al v. Aetna Inc., et al.*; 2:11-cv-285-JRG (USDC EDTX) and *Liberty Mutual Personal Ins. Co. v. Phoenix Licensing, LLC, et al.*; No. 1:11-cv-01507-JDB (USDC DC).

(4) The expected length of trial.

Depending upon the number of Defendants who are in the case at time of trial, Plaintiff expects the trial to last seven to ten court days.

Depending upon the number of Defendants who are in the case at time of trial and the number of claims at issue at the time of trial, Defendants expect the trial to last fifteen court days.

(5) Whether the parties jointly agree to trial before a magistrate judge.

The parties have not jointly agreed to trial before a magistrate judge.

(6) Whether a jury demand has been made.

A jury demand has been made.

(7) Proposed modification of the deadlines in the Proposed Docket Control Order set forth by the Court.

Plaintiff's position:

Plaintiffs propose the deadlines set forth in the proposed Docket Control Order attached hereto as Exhibit A. Plaintiff's suggested pre-*Markman* deadlines track those of the related *Aegon* case which is pending before Judge Gilstrap (along with the related *ING* and *Aetna* cases

noted above).[13] The proposed schedules submitted by Plaintiffs and Defendants both suggest a *Markman* hearing on the same day as the *Markman* hearing for the *Aegon* case.[14] Plaintiff's suggested post-*Markman* deadlines also track, but in general slightly precede, those of the *Aegon* case, because the Court's model Docket Control Order has this case set for trial a month earlier than the *Aegon* case. The two primary areas of disagreement between Plaintiffs and Defendants, as reflected on their competing Docket Control Orders, appear to be Defendants' desire to postpone the trial of this case until some indeterminate date after the trial of the *Aegon* case, and whether Plaintiffs should be required to arbitrarily limit the number of asserted claims at various junctures in the case, culminating at 10 claims total at trial for the three patents-in-suit combined. Although limits on asserted claims have been imposed by Judge Folsom in the past, that is not the prevailing practice in this District (or nationwide), and Plaintiffs respectfully submit that such limits are inappropriate, premature, and they would be unfairly prejudicial to Plaintiffs, including since there has yet been no discovery with respect infringement or prior art. *See, e.g., Realtime Data, LLC d/b/a IXO, v. Metropcs Texas, LLC et al.*, No. 6-10-cv-00493-LED-JDL (E.D.Tex. Dec. 13, 2011) ("At this stage in the litigation, it is inappropriate to micro-manage the number of asserted claims, particularly prior to the Markman proceeding. After the claim construction hearing, the Court will consider a future deadline by which [plaintiff] shall reduce the number of asserted claims to a manageable number as the litigation proceeds toward the dispositive motion stage."). In addition, it should be noted that Judge Gilstrap has not imposed any limits on asserted claims in the related *Aegon* case, nor is it expected he will impose such limits on the

[13] The Docket Control Order from the *Aegon* case is at Exhibit C hereto.

[14] This case and its related cases – *Aegon, ING* and *Aetna* -- were initiallyassigned to Judge Ward. However, due to various recusals and reassignments – *see* Dkt Nos. 37, 206 and 215, and undocketed order of January 4, 2012 – this case has been assigned to this Court while its three related cases involving overlapping patents are pending before Judge Gilstrap. Plaintiff's certainly defer to the courts on what is best with respect to case assignments, but the interests of justice, including judicial economy and the avoidance of inconsistent results, likely mitigate in favor of all these related cases being in the same court, especially with respect to *Markman* proceedings.

other related cases involving overlapping patents which are pending in that court. Thus, arbitrarily limiting the number of asserted claims in this case may lead to problems in the future due to a lack of coordination between related cases. In particular, there is no reason to set the trial of this case behind the trial of the *Aegon* case if the trial of this case would arbitrarily be limited to ten asserted claims as Defendants' suggest. Like the *Realtime Data* case noted above, once the claims have been construed, if the number of claims is still an issue, then the Court should consider, at that point, whether to require Plaintiffs to reduce the number of claims as the case proceeds towards the dispositive motion stage. At that point, the discovery process and *Markman* process should help the parties better focus on which claims are most appropriate to take to trial based upon the facts and issues in dispute.

Defendants' position:

Defendants propose the deadlines set forth in the proposed Docket Control Order attached hereto as Exhibit B which is consistent with this Court's Example Scheduling Order (ECF No. 216, pages 7-13 of 14), the Patent Local Rules, and the Federal Rules of Civil Procedure. In order to prevent duplication of efforts and the potential for inconsistent claim construction within the district, Defendants propose that this case track the *Aegon* case presently pending before Judge Gilstrap which relates to the same patents. Defendants' proposed Docket Control Order, unlike Plaintiff's, sets forth dates by which Plaintiff must limit the number of claims prior to the claim construction hearing that is consistent with past procedure and precedent of this jurisdiction. The three patents asserted against the multiple defendants contain over 500 claims. The proposed procedure would allow the Plaintiffs to pick an adequate number of representative claims while making the case efficient and manageable.

The Court may limit the number of Plaintiff's claims prior to claim construction. *In re Katz Interactive Call Processing Patent Litig.*, 639 F.3d 1303, 1311-1312 (Fed. Cir. 2011). Further, courts in the Eastern District of Texas have required plaintiffs to "limit the number of asserted claims in cases for patent infringement when the number of claims is so large as to make the case inefficient and unmanageable." *Realtime Data, LLC v. Packeteer*, No. 6:08-CV-144 (E.D. Tex. March 16, 2009) (citing *Negotiated Data Solutions, LLC v. Dell, Inc.*, No. 2:06-CV-528 (E.D. Tex. July 31, 2008) (Everingham, J.) (ordering plaintiff to limit asserted claims to 40 on or before the due date for its opening *Markman* brief); *Hearing Components, Inc. v. Shure, Inc*.,, No. 9:07-CV-104, 2008 WL 2485426, at *1 (E.D. Tex. June 13, 2008) (Folsom, J.) (ordering parties to elect no more than ten claim terms for construction and further ordering plaintiff to select no more than three representative claims from each asserted patent for claim construction and trial); *Joao Bock Transactions Systems of Texas, LLC v. AT&T, Inc.*, No. 6:09-CV-208 (E.D. Tex. Mar. 29, 2010) ("The Court strongly cautions [Plaintiff] to narrow its case. Based on the Court's experience, a patent case involving the current number of claims (424) and Defendants is unmanageable." suggesting that asserting very many claims, even at the pleading stage is inefficient.); *SynQor, Inc. v. Artesyn Technologies, Inc. et al.*, No. 2:07-CV-00497 (E.D. Tex. March 25, 2010) (Everingham, M.J.) (reducing claims from 183 to 50 pre-*Markman*); *Round Rock Research, LLC v. Dell*, No. 4:11-CV-332 (E.D. Tex. March 26, 2012) (ordering plaintiff to limit asserted claims to a total of 40 across ten patents prior to claim construction). Judge Gilstrap has not ordered limitations on claims in the *Aegon* case because the defendants in that case have not yet asked the court to limit the number of claims.

(8) The need for and modification of the proposed specific limits on discovery relating to claim construction, including depositions of witnesses, including expert witnesses.

The parties do not presently see the need for special provisions for discovery relating to claim construction. If a party anticipates the need for expert testimony in connection with claim construction, it will timely notify the other parties, and they will try to agree upon a process for such discovery.

(9) The entry of a Protective Order.

The parties are communicating about an agreed protective order, and if they cannot agree, they will seek resolution by the Court.

(10) The appointment of a Technical Advisor or Special Master.

The parties do not object to the appointment of a technical advisor but do not anticipate that one will be necessary during the claim construction phase of this case. The parties reserve the right to seek appointment of a technical advisor depending on the nature of each others' allegations.

(11) The number of claims being asserted.

Although not all asserted claims are asserted against every Defendant, Plaintiff presently intends to assert 20 claims of the '434 patent, 55 claims of the '938 patent and 15 claims of the 366 patent.

Defendants object to Plaintiff's assertion of 110 claims in this case. Defendants request that Plaintiff be required to limit its asserted claims to no more than 10 claims per defendant group.

(12) The possibility of early mediation.

Plaintiffs contend early mediation would be beneficial.

Defendants contend that early mediation would be beneficial.

The parties have selected both a mediation date and a date on which to identify the mediator. Those dates are listed in the proposed Docket Control Order.

(13) Local Rules pertaining to attorney misconduct.

Counsel for the parties are familiar with the Local Rules pertaining to attorney misconduct, including Local Civil Rules AT-2 and AT-3.

(14) Discovery.

The parties jointly propose the provisions set forth in the proposed Discovery Order attached hereto as Exhibit D.

April 6, 2012

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I certify that this is a joint filing approved by counsel for all parties.

April 7, 2012 /s/ John J. Edmonds
John J. Edmonds

CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3).

April 7, 2012 /s/ John J. Edmonds
John J. Edmonds